



State of New Jersey

Department of Environmental Protection

Christine Todd Whitman
Governor

Robert C. Shinn, Jr.
Commissioner

August 22, 2000

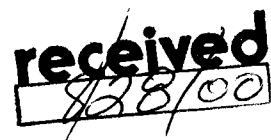
Yasmin Yorker, Title VI Team Leader
Title VI Guidance Comments
US Environmental Protection Agency
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue NW
Washington, DC 20460

Dear Ms. Yorker:

The following comments are hereby submitted by the New Jersey Department of Environmental Protection regarding the Draft Title VI Recipient Guidance and Draft Title VI Investigation Guidance:

An initial review of the two guidances issued by EPA regarding Title VI is a combination of good news and bad news. The good news is that EPA has demonstrated in the external guidance it clearly listened to the comments and arguments from the states to permit flexibility in the design of their respective environmental justice programs. The suggestions outlined in the external guidance, resemble many of the ideas and suggestions that the various states have been working on over this past two years. The bad news is that EPA still clings to the position, that no matter what a state recipient does in implementing a Title VI program, that they reserve the right to a *de novo* investigation and determination as to whether the state effort is good enough.

Once a complaint is filed, the burden is still on the recipient to prove the negative. EPA's statement that no single definition of adverse disparate impact is possible due to the differing nature of impacts and the various environmental media, may impact the likelihood of a successful environmental justice effort. If there is no consistent definition of disparate impact, how is a recipient, the EPA, the Courts and most importantly the community to know that discrimination has occurred. What is the standard? Can each



interested stakeholder have a different definition?

A positive element is EPA's acceptance of the ability of the recipient to justify a disparate impact, however defined. This is critical to the ability of projects of significance that are for the broader public good to proceed. However, EPA claims the right to rebut a justification if it determines there may be a less discriminatory alternative. Does this mean that EPA now will be able to over ride a state and local determination of the significance of a project of public import. What are the standards for this determination. Is this an Alternatives Analysis in disguise?

Many of the issues raised by the former guidance are resolved by EPA in the new external guidance with broad statements of intent that still leaves the states guessing. And if the states are guessing, those industries that need permits are going to be even more leery to come forward and volunteer to participate in state efforts to address EJ issues. Without an EPA endorsed state program many states will opt out of the effort to create an Environmental Justice program, which will certainly result in EPA being inundated with Title VI complaints.

As positive as the external guidance tries to be, the new internal guidance is disappointing. It creates a maze in which the recipient and the community must negotiate. The time frames ensure that state programs will not be able to assure finality to a permitting process. In these respects the internal guidance has changed little. The internal guidance clearly states that a goal is to informally resolve complaints. This "informality" unfortunately comes at the end of the permitting process where a state may have already undertaken legitimate "informal" and formal dispute resolution processes and even come to some agreement.

It appears that EPA gives itself 180 days to make its preliminary finding. However, when one reads the detailed analysis that is required, it is doubtful that such a deadline could be met. There are no less than six complex steps in the adverse disparate impact analysis. The reality is that the science has not caught up with legal requirements as interpreted by EPA. Several of these steps involve considerable scientific and statistical information, much of which will have to be new data or culled from a host of sources.

While EPA has tried to provide a degree of flexibility to the recipient, they likewise have allowed their decision making process to be so broad and uncertain, that the agency could at some future time allow other influences to impact decision making. While this may not occur, the decision making process may however lead to such an adverse appearance.

Much more work needs to be completed before this guidance takes on a quasi-regulatory effect.

New Jersey's Approach

The New Jersey Department of Environmental Protection advocates an up-front approach

to address environmental justice concerns. **Section II-C, "Due Weights"**, of the revised Draft Recipient Title VI Guidance states: "...While EPA encourages efforts to develop proactive Title VI approaches, under the Civil Rights Act of 1964, EPA is charged with assuring compliance with Title VI. Thus, EPA cannot completely defer to a recipient's own assessment that it has not violated Title VI or EPA's regulations.... EPA believes that it can, under certain circumstances, recognize the results of analyses you submit and give them appropriate due weight." Although this position is clear, we would hope that the "due weight" would be **significant**. Such significant consideration is vital to those states, like New Jersey, that have developed EJ processes that are voluntary. Such consideration will encourage permit applicants to participate in the EJ process.

As one of the original five recipients to receive an EPA funded State and Tribal Environmental Justice Grant to develop our EJ program, the NJDEP has focused on a proactive approach which utilizes a screening tool to evaluate each permit application for potential environmental justice concerns. **Section IV- B, " Implementing Informal Resolutions"** of the Draft Investigative Guidance states: "Denial of the permit at issue will not necessarily be an appropriate solution. It will likely be a rare situation where the permit that triggered the complaint is the **sole** reason a discriminatory effect exists "recipients can offer to provide various measures to reduce or eliminate impacts that are narrowly tailored toward contributing sources..." The model which NJ is proposing to use to identify potential EJ areas has the ability to implement this strategy.

As mentioned, New Jersey's process advocates the evaluation of each permit application independently. This avoids the pre-identification of communities, a process that may be detrimental to urban revitalization, which is occurring in New Jersey at a record pace.

Once the application review is complete, and if our evaluation determines that an application has environmental justice implications, affected communities are informed about the respective permit application during the initial stages of the permitting process. In addition, affected applicants are encouraged to enter into a series of informational meetings with the community to determine if concerns exist, and if so, to work with the community, in partnership with the NJDEP, to address the issues of concern. This proactive, community partnership approach would occur simultaneously with the permit application review. Information detailing this process is attached for your consideration.

Adverse Impact and Disparity

Section VI-C, "Adverse Disparate Impact Analysis", presents a methodology which appears to make a finding of disparate impact the inevitable outcome of any analysis. This occurs because portions of the two population related variables which are being tested for independence (adverse impacts and demographic characteristics) are initially selected on the basis of being at the extremes of their respective distributions. These groups are then compared in a way, which essentially restates that variations exist in populations and relabels that variation disparate. The current methodology can produce a


finding of disproportionate impact even when the exposures to all race, color, and national origin groups are identical **between** groups (indicating no disparity) but normally distributed **within** groups.

Section VI-B-5b, "Comparison to Assess Disparity" states that one of the comparisons to be conducted will be "the demographic characteristics of an affected population to demographic characteristics of a non-affected population or general population" . The problem with the implied use of a non-minority, **non-affected** (less exposed) population as a comparison population or control for a minority and affected population is that it is the wrong group to test whether or not there is disparity of exposure between minority and non-minority communities. The comparison of interest is among the demographic characteristics of all the **affected** communities. It must be ruled out that there is not a non-minority population which is as highly exposed as the highest of the minority populations.

A further problem with the comparison population concept in this methodology is evident in the third paragraph of section VI- B-6. Here it is stated: "For instance, measures of the demographic disparity between an affected population and a comparison population would normally be statistically evaluated to determine whether the differences achieved statistical significance to at least 2 to 3 standard deviations." A statistically significant difference cannot be determined to exist between only two numbers, such as the percentages of minority composition of an affected population and a comparison population. It could be determined, however, if the minority population of one population is at least 2 or 3 standard deviations above the mean of the distribution of minority populations of all the communities. If this is done, however, there is no single comparison population.

There has been an attempt in this version of the EPA Title VI Guidance to be more explicit in the explanation of the methodology for the determination of disparate impact by race, color, or national origin resulting from permitting decisions. Imbedded in the methodology, however, is a mathematical algorithm which must be demonstrated to be correct with multiple tests on either real or synthetic data. As far as can be determined no test has been undertaken, and thus there is no evidence right now on whether this method will produce valid and reliable results. An alternative to the comparison population method is the "Emission Index Approach to Analysis" found in Perlin (1995) page 75. From tests of this methodology undertaken by the state of NJ it appears to avoid the fundamental problems that may exist in the current version of the USEPA Title VI Guidance.

Sincerely,

A handwritten signature in cursive script that reads "Pamela Lyons".

Pamela Lyons
Director

Reference: Perlin et al. (1995) Distribution of Industrial Air Emissions by Income and Race in The United States: An Approach Using the Toxic Release Inventory. Environmental Science and Technology